Supreme Court, U.S.
FILED

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No.

in the Supreme Court of the United States

OCTOBER TERM, 1993

ALBERTO A. ROSALES, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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22 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's new disentitlement rule pertaining to defendants who became fugitives while their cases were pending in the district court conflicts with this Court's decision in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199 (1993), and with similar rules set forth by other circuits.

2. Assuming the propriety of the Eleventh Circuit's disentitlement rule, whether its application in this case violated Petitioner's constitutional rights.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, which is subject of this Petition, has been published at 13 F.3d 1461 (11th Cir. 1994).

JURISDICTION

On February 10, 1994, the United States Court of Appeals for the Eleventh Circuit entered the judgment from which we seek review.

Jurisdiction is vested in this Court pursuant to the provisions of 28 U.S.C. 1254(1), and Supreme Court Rules 10.1(a) and 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides in pertinent part:

> No person shall — be deprived of life, liberty, or property, without due process of law.

The United States Constitution, Amendment XIV, provides in pertinent part:

> Section 1. — No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone,

the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner became a fugitive the day before closing arguments in a criminal trial that last more than three weeks. Petitioner was convicted on all counts in absentia, and he was sentenced approximately two years later after his recapture to a period of 85 years imprisonment. Although there were several co-defendants at trial, only two went to verdict and only Petitioner pursued an appeal.

After filing a timely Notice of Appeal, the Eleventh Circuit Court of Appeals dismissed the appeal on the ground that Petitioner had forfeited his right to appeal because he had become a fugitive during trial. *United States v. Rosales*, 978 F.2d 719 (11th Cir. 1992).

Petitioner filed his Petition For Writ of Certiorari to this Court, and this Court remanded the case back to the Eleventh Circuit Court of Appeals in light of its decision in *Ortega-Rodriguez v. United States*, ____U.S. ____, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). *Rosales v. United States*, ____ U.S. ____, 113 S.Ct. 2406, 124 L.Ed.2d 631 (1993).

On remand, the appellate court has once again dismissed Petitioner's appeal, and in doing so, it has created a new disentitlement rule that violates this Court's decision in *Ortega-Rodriguez*, and it misapplies the facts of this case in violation of Petitioner's due process and equal protection rights.

Federal jurisdiction was conferred at the outset of this case because Petitioner was indicted in the United States

District Court for the Southern District of Florida, was tried and convicted in that court. Jurisdiction then vested in the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. Section 1291.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the rule promulgated by the Eleventh Circuit Court of Appeals in *United States v. Ortega-Rodriguez*, 13 F.3rd 1474 (11th Cir. 1994), does not comport with this Court's holding in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). The Eleventh Circuit's new disentitlement rule, which broadly provides that a defendant's direct appeal will be dismissed if he becomes a fugitive at any time during the proceedings before the district court or appellate court unless the defendant satisfies a two part test, does not follow this Court's *Ortega-Rodriguez* decision, nor is it constitutional as applied. Moreover, the Eleventh Circuit rule conflicts with decisions in the Ninth Circuit and the District of Columbia Circuit.

ARGUMENT

I.

THE ELEVENTH CIRCUIT'S NEW DISENTITLEMENT RULE PERTAINING TO DEFENDANTS WHO BECAME FUGITIVES WHILE THEIR CASES WERE PENDING IN THE DISTRICT COURT CONFLICTS WITH THIS COURT'S DECISION IN *ORTEGA-RODRIGUEZ v. UNITED STATES*, ____ U.S. ____, 113 S.Ct. 1199 (1993), AND WITH SIMILAR RULES SET FORTH BY OTHER CIRCUITS.

Petitioner contends that the decision in *United States v. Ortega-Rodriguez*, 13 F.3rd 1474 (11th Cir. 1994), is erroneous because it conflicts with this Court's holding in *Ortega-Rodriguez v. United States*, ____ U.S. ____, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993). The Eleventh Circuit dismissed Ortega-Rodriguez's appeal without hearing the merits because he had become a fugitive after trial but prior to sentencing. In reaching this conclusion, the Eleventh Circuit further extended its decision in *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982), by concluding that a defendant who fled after conviction but before sentencing waived his right to an appeal by engaging in conduct that was detrimental to the "legal system".

This Court viewed the controversy differently and held as follows:

> Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system.

> Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," [citation omitted], the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.
>
> We did not ignore the possibility that some action by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction . . . *In the class of appeals premised on insufficiency of the evidence, however, in which petitioner's appeal falls, retrial is not permitted in the event of reversal, and this type of prejudice to the Government will* not *serve as a rationale for dismissal.* [Emphasis Added]

Ortega-Rodriguez v. United States, 113 S.Ct. at 1208.

The Eleventh Circuit took *Ortega-Rodriguez* on remand[1] and fashioned the following rule:

> We hold that this Court should dismiss a former fugitive's appeal *unless the defendant can show* that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not result in significant interference with the operation of the judicial process *in either the district court or the appellate court.*

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[1]Incredibly, the Eleventh Circuit, upon dealing with the *Ortega-Rodriguez* appeal on its merits, reversed the defendant's conviction because of insufficiency of the evidence. Were it not for this Court's decision, at least one defendant would be serving an extended jail sentence due to a conviction based upon insufficient evidence.

United States v. Ortega-Rodriguez, 13 F.3d 1474, 1476 (11th Cir. 1994).

On the same day it rendered its decision in *United States v. Ortega-Rodriguez, supra*, the Eleventh Circuit decided Petitioner's case, *United States v. Rosales*, 13 F.3d 1461 (11th Cir. 1994), which had also been remanded from this Court to the Eleventh Circuit after our previously filed petition for writ of certiorari was granted. *Rosales v. United States*, ____ U.S. ____, 113 S.Ct. 2406, 124 L.Ed.2d 631 (1993).

Petitioner contends that the Eleventh Circuit's new disentitlement rule as enunciated in *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994), and applied in that case and *United States v. Rosales*, 13 F.3d 1461 (11th Cir. 1994), is inconsistent with this Court's holding in *Ortega-Rodriguez v. United States, supra*. The essence of this Court's ruling was that appeals would be dismissed only in the rarest of circumstances. *Id.* at 1208. The Eleventh Circuit's rule presumes that any defendant who becomes a fugitive for any period of time, irrespective of whether the case rests with the district court or the court of appeals, must have his appeal dismissed unless the defendant can persuade the appellate court that the government will not suffer any undue burden, *and* that the defendant's flight will not result in significant interference with the operation of the judicial process in *either the district court or the appellate court*. *United States v. Ortega-Rodriguez*, 13 F.3d at 1476.

There are two aspects of the Eleventh Circuit rule which are objectionable. First, there is a legal presumption that an appeal will be dismissed unless the defendant can satisfy both parts of the court's two-pronged test. Since appeals to the Court of Appeals from criminal convictions

are a matter of right,[2] it is unreasonable for the court to impose such a heavy legal burden on the defendant, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988), especially given the lengthy sentences prescribed by the Federal Sentencing Guidelines, including the death penalty in an expanded number of cases.

Additionally, the appellate court should not dismiss an appeal because the delay occasioned by the defendant's flight has significantly interfered with the operation of the district court. That portion of the Eleventh Circuit test contradicts an important element of this Court's holding in *Ortega-Rodriguez*. This Court stated:

> In short, when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that will justify an appellate sanction of dismissal. *In such cases, fugitivity while a case is pending before a district court, like other contempts of court, is best sanctioned by the district court itself.* [Emphasis Added]

Ortega-Rodriguez v. United States, 113 S.Ct. at 1209.

Therefore, the combination of both elements of the Eleventh Circuit test are clearly violative of this Court's holding in *Ortega-Rodriguez*. The Eleventh Circuit has engaged in semantical gadgetry to create a new rule that is

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[2]Petitioner recognizes that there is no *constitutional right* to an appeal from a criminal conviction, *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977), and that the automatic right to appeal a criminal conviction to the Court of Appeals is statutory. See, F.R.A.P. Rule 4(b).

essentially the same as the old rule that was disapproved by this Court.

At least two other circuits have declined to follow the Eleventh Circuit's new rule. In *United States v. Reese*, 993 F.2d 254, 256 (DC Cir. 1993), the District of Columbia Circuit made the following disentitlement rule in light of the Court's decision in *Ortega-Rodriguez, supra*:

> In *Ortega-Rodriguez* the Supreme Court contemplated that the Courts of Appeal would "develop [ ] generally applicable rules to cover specific, recurring situations." *Id.* n. 23.
>
> Accordingly, we hold that a defendant whose flight prevents consolidation of his appeal with that of a co-defendant is not entitled to a delayed appeal to this Court. By thwarting consolidation, such fugitivity inherently disrupts the appellate process. To reward the fugitive by granting his claim to a second helping of the court's limited resources would be perverse indeed. [citation omitted]

The Ninth Circuit appears to be handling these matters on a case by case basis. In *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir. 1994), the defendant fled prior to sentencing and was a fugitive for 13 years before his capture and sentence. Meanwhile, his co-defendant, who was also convicted at trial, proceeded with a timely appeal, the conviction was reversed and remanded, and the U.S. Attorney's Office declined to reprosecute. The Ninth Circuit dismissed the defendant's appeal because his 13 year absence would severely prejudice the government's efforts at retrial, and the defendant's flight precluded the Ninth Circuit from

consolidating his appeal with that of his co-defendant, thereby imposing a burden on the appellate court.

However, in *United States v. Hearron*, ____ F.2d ____, U.S. App. Lexis 1576 (9th Cir. 1994), the defendant became a fugitive while on bond pending appeal twice. Nevertheless, the Ninth Circuit reinstated his appeal and reversed his conviction. In doing so, the court pointed out that the Supreme Court's decisions in *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970), and *Estelle v. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975), sanctioned the concept that an appellate court may invoke procedural rules to protect its jurisdiction and to insure the orderly and efficient use of its resources. *Id.* at 4. Of course, this Court ratified the *Molinaro* rule in its decision in *Ortega-Rodriguez v. United States*, 113 S.Ct. at 1209-1210. In reaching its decision in *Hearron*, the Ninth Circuit reasoned as follows:

> While we accept the necessity of this entitlement to prevent a current fugitive from taking improper tactical advantage of the court, we believe for two reasons that the disentitlement doctrine should be expanded *only with great caution*. First, jurisdictional schemes as well as the fixing of the penalties for escape ultimately belong within the province of the legislature, not the judiciary. Yet the disentitlement doctrine consists of a judicial refusal to exercise jurisdiction. *It is better that we defer to Congress on the issue of what effect an escape followed by return or recapture should have on further judicial proceedings.* Second, the disentitlement doctrine may well bar otherwise meritorious claims. *Society as well as the individual defendant has an interest in judicial review of convictions and*

sentences allegedly imposed in violation of the Constitution. [Emphasis Added]

United States v. Hearron, ____ F.2d at ____, U.S. App. Lexis at 4, citing *United States v. Katz*, 920 F.2d 610, 613 (9th Cir. 1990).[3]

For these reasons, the Court should take certiorari and fashion a consistent and constitutionally sound disentitlement rule that would recognize a defendant's right to direct appeal as guaranteed by Rule 4 of the Federal Rules of Appellate Procedure, which right would be forfeited by a defendant only in extraordinary circumstances.

II.

ASSUMING THE PROPRIETY OF THE ELEVENTH CIRCUIT'S DISENTITLEMENT RULE, ITS APPLICATION IN THIS CASE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

In deciding to dismiss Petitioner's appeal for the second time, the Eleventh Circuit ruled that Petitioner was unable to satisfy either part of the two-pronged test.

First, the appellate court concluded that the government would be unduly burdened if this case were sent back for a retrial, pointing out that the case agent, Arthur Cash, died during the pendency of the appellate

[3]The caution exhibited by the Ninth Circuit concerning the effect of dismissing a meritorious appeal was certainly borne out by the Eleventh Circuit's decision in *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994), insofar as the Eleventh Circuit had dismissed the appeal of a defendant whose conviction was based upon legally insufficient evidence.

process. The government even attached a copy of Agent Cash's death certificate, which we attach in Appendix A-1. However, Agent Cash died on August 25, 1987, only *four months* after Petitioner was found guilty at trial (the jury's verdict was taken on April 17, 1987). Thus, even if Petitioner had never become a fugitive, Petitioner's appeal would not have been decided four months after the jury's verdict, and the government would still be without Agent Cash's testimony through no fault of Petitioner.[4]

It should also be noted that of the five issues raised in Petitioner's brief to the Eleventh Circuit, three issues deal with sufficiency of the evidence.

Thus, if Petitioner was to succeed on his appeal, the most serious charges (continuing criminal enterprise and the two conspiracy counts), would be reversed outright. Even if convicted after retrial on all the remaining counts, Petitioner's maximum sentence would be 25 years rather than the 85 years be originally received.[5] Given Petitioner's age and the fact that his sentence was imposed under pre-guidelines law, the potential difference in sentence would mean that Petitioner could reasonably expect to be released from prison before he died.

Next, the appellate court contends that Petitioner's fugitiveness was directly responsible for the 4½ year delay

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[4]Of course, the government would not lose Agent Cash's testimony at a retrial, because the government would surely be able to introduce his testimony and that of any other unavailable witness under F.R.E. Rule 804(b)(1).

[5]The Eleventh Circuit did address the issue in Petitioner's appeal that Petitioner could not be sentenced consecutively on the CCE count (the sentence was 45 years), and the three conspiracy counts (the sentence was 5 years consecutive to each other and consecutive to the CCE count). As a result, Petitioner's net sentence was reduced to 70 years.

between conviction and the filing of the appellate brief.[6] If Petitioner had not fled, reasoned the Eleventh Circuit, his bond would not have been forfeited and the assets that were lost to the forfeiture would have been available to pay for the trial transcripts.

The appellate court's reasoning makes no sense. For example, would the appellate court have reached a different result if Petitioner had engaged in a narcotics transaction utilizing his home, the premises of his bakery and one of his automobiles? Under those circumstances, it is likely that all those assets would have been forfeited pursuant to 21 U.S.C. § 881, *et. seq.* Yet, Petitioner's appeal would not have been dismissed due to the delay caused by litigating his motion to be declared indigent for costs. There is no logical reason to penalize Petitioner for committing a transgression (becoming a fugitive), that is less serious than others (dealing in cocaine).

As a result, a defendant who is penalized for exercising his right to be declared indigent for costs in connection with the prosecution of his direct appeal is deprived of due process as guaranteed by the Fourteenth Amendment to the U. S. Constitution, *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), and of equal protection of the law. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963).[7]

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[6]Petitioner spent almost one year litigating whether he should be declared indigent for purposes of appellate costs so as to secure the trial transcript to perfect his appeal. The government consistently opposed what is usually a routine motion before the United States magistrate and forced Petitioner's counsel to appeal the magistrate's determination to the district court and to the court of appeals. The government took another six months to file its answering brief.

[7]Despite judgments entered against the sureties by the district court due to Petitioner's flight, it should be noted that he lost his home because it was foreclosed by the bank for lack of payment; his cars were

(Footnote continued on next page)

Finally, the substantive appeal that has never been heard, if won by Petitioner, will require the Eleventh Circuit to reverse the major counts in the indictment for insufficiency. While it is possible that the case could be remanded for retrial on certain counts, the government would not be unfairly prejudiced because of the untimely death of its agent.[8]

(Footnote continued from previous page)
never seized because they were essentially worthless; and his bakery business was taken over by a lender. Since Petitioner was the sole wage earner in his household, his family would have lost the home, the cars and the business anyway assuming he had surrendered to prison in the normal course of events.

[8]See footnote 4, *supra*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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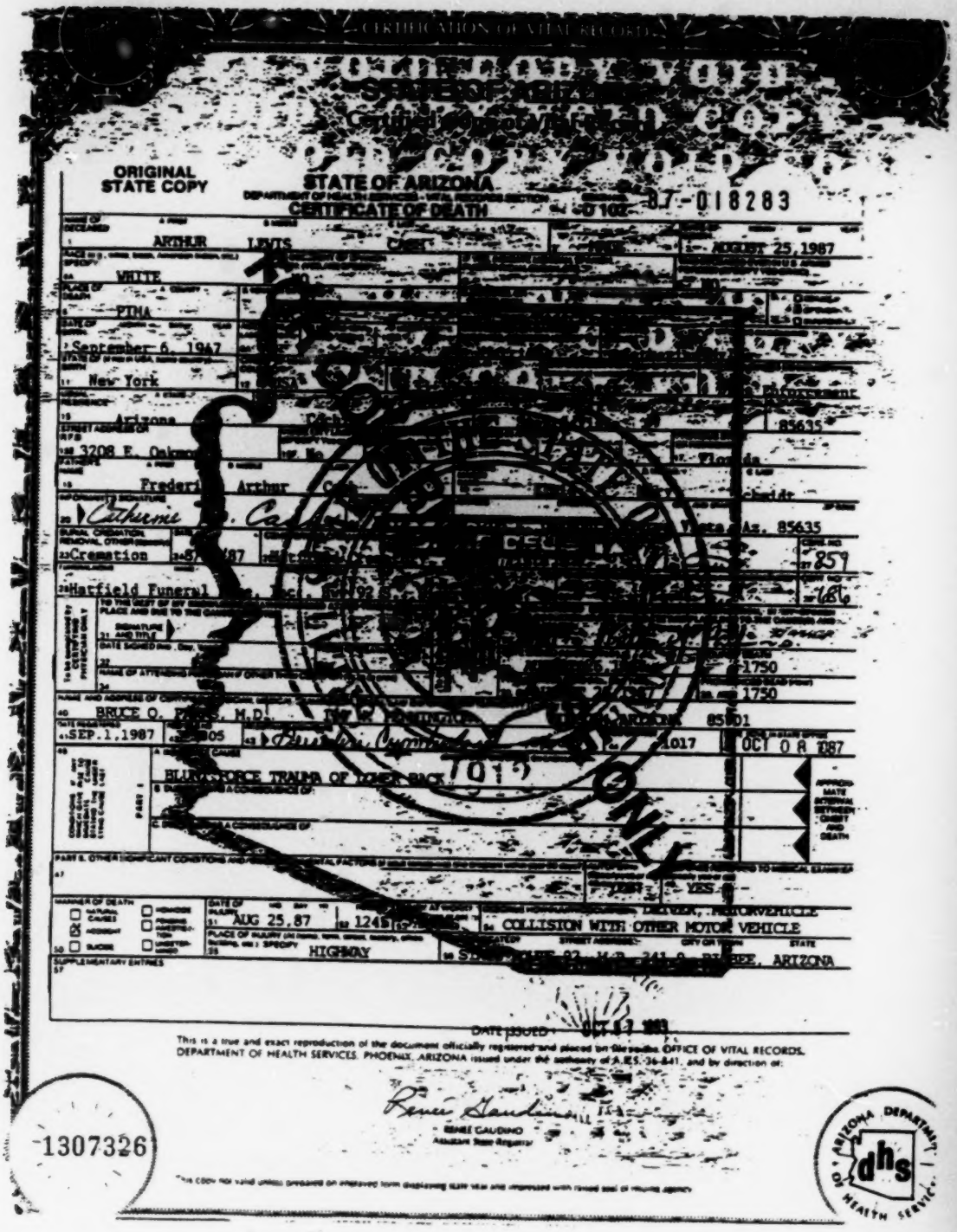
DATED: June 16, 1994

Appendix


CERTIFICATION OF VITAL RECORDS

ORIGINAL STATE COPY

STATE OF ARIZONA

CERTIFICATE OF DEATH

87-018283

ARTHUR LEWIS

AUGUST 25, 1987

WHITE

PIMA

September 6, 1947

New York

Arizona

3208 E. Quincy

85635

Frederi Arthur

Florida

Catherine B. Ca

Ariz. 85635

Cremation

Hatfield Funeral

1750

1750

BRUCE O. P[illegible], M.D.

SEP.1.1987

85701

1017

OCT 0 8 1987

BLUNT FORCE TRAUMA OF TORSO

AUG 25,87

1245

YES

COLLISION WITH OTHER MOTOR VEHICLE

HIGHWAY

[illegible] ARIZONA

DATE ISSUED: OCT 8 7 1987

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